(5)

No. 96-8422

In The

Supreme Court of the United States

October Term, 1997

SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR PETITIONER

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HIPP

QUESTIONS PRESENTED

1. Was the evidence at trial legally sufficient to convict a then 19-year old Petitioner of unlawfully dealing in firearms, in the absence of proof that he knew that he was required to possess a Federal Firearms Dealer's License?

2. Was the Court's jury charge legally deficient because it failed to require a finding of Petitioner's knowledge that a Federal Firearm Dealer's License was required, thereby unconstitutionally diminishing the Government's burden of proof?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER

TABLE OF AUTHORITIES – Continued

OPINION BELOW

Per Curiam

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit (J.A. 20-26)* is reported at 122 F.3d 90 (2d Cir. 1997). The District Court filed no reported decision.

JURISDICTION

Petitioner appeals from an order of the United States Court of Appeals filed on February 10, 1997 (the mandate was issued on March 3, 1997) which unanimously affirmed, in a *per curiam*, subsequently published opinion (122 F.3d 90 (2d Cir. 1997)) a judgment of the United States District Court, Eastern District of New York (Trager, J.) entered on June 3, 1996 upon a jury verdict convicting Petitioner of both conspiring to deal and dealing in firearms without a federal firearms license in violation of 18 U.S.C. § 371, 18 U.S.C. § 922(a)(1)(A), and 18 U.S.C. § 924(a)(1)(D), and imposing a 57 month sentence. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition of Certiorari was granted on December 12, 1997.

* Page citations proceded by "J.A." refer to the Joint Appendix.

STATUTES INVOLVED

18 U.S.C. § 371 states:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 922(a)(1)(A)

Unlawful acts

It shall be unlawful for any person – except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce;. . . .

18 U.S.C. § 924(a)(1)(A)-(D)

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever –

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm, or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

STATEMENT OF THE CASE

1. Proceedings in the District Court

Petitioner, SILLASSE BRYAN, of Brooklyn, New York was indicted by an Eastern District of New York Grand Jury for the crimes of conspiracy to distribute firearms without a federal firearms dealer's license (18 U.S.C. § 371) and with a substantive violation of 18 U.S.C. § 922(a)(1)(A) involving handguns allegedly purchased in Columbus, Ohio by intermediary purchasers (so called "Straw Purchasers") 53 year old Delores Marie Tillman, and Nicole Bradley.

The firearms in issue were purchased in 1993 from local gun shops, upon presentation by the "straw purchaser" of a valid Ohio drivers license, and payment of the applicable sale price. The laws of Ohio do not limit the number of weapons which can be purchased.

Delores Tillman testified under a cooperation agreement, acknowledging theft convictions in 1961, and 1989. Following her 1996 arrest for gun trafficking, she agreed to cooperate, and entered into a "deferred prosecution" agreement with the Government. Her trial testimony, presumably credited by the jury, established her purchase of .380 Lorcin pistols, utilizing a bogus photo identification bearing the name "Delores Kenzer." The pistols were allegedly given to Petitioner in exchange for $300.00. The pistols were subsequently transported to New York, and distributed there.

Nicole Bradley, the second "straw purchaser" bought pistols utilizing her own name, but admitted having knowingly lied on the pistol purchase application. She testified she gave them to Petitioner, in exchange for money.

Ms. Bradley was not formally arrested on a complaint until February 4, 1996 (5 weeks prior to trial). In 1991 she was convicted of forgery. In 1993 she was arrested for theft, and sentenced, in turn, to serve an 18 month jail sentence.

Ms. Bradley pleaded guilty, and testified under a "cooperation agreement."

In addition to the testimony of the two "cooperators," the jury heard testimony that a search of Bureau Of Alcohol, Tobacco and Firearms (hereafter A.T.F.) files

revealed no record of Petitioner holding a firearms dealer's license.

Detective James Ward of the A.T.F. Task Force testified that following the Petitioner's arrest on August 15, 1995, and after Miranda warnings, Petitioner acknowledged travelling to Columbus, Ohio, soliciting various individuals, including Tillman, to purchase firearms for him and transporting the weapons himself, or with the help of others, to New York, where they were sold in various Brooklyn locations for $500.00 each (T 218-20). Although Detective Ward testified that he neither tape-recorded the post-arrest statement, nor obtained the Petitioner's signed acknowledgement of the confession, he made "verbatim notations" of Bryan's statement (T 230-32).

Testimony was thereafter received from six New York City Police Officers identifying six of the firearms purchased in Columbus, Ohio that were ultimately seized at various locations in Brooklyn and Manhattan, New York (T 177-98, 201-06, 246-50).

At the conclusion of the Government's case, Petitioner moved pursuant to Rule 29 for a directed verdict. The Court denied the motion.

The Petitioner did not testify in his own behalf, the sole defense witness was Petitioner's mother Ernestine Bryan. She testified that Petitioner was learning impaired, and attended local public schools where he was assigned to "Special Education" classes. He was never promoted beyond the 9th grade, and dropped out of school.

At the conclusion of the entire case, Petitioner unsuccessfully renewed his Rule 29 motion.

THE COURT'S CHARGE

With respect to the issue of *mens rea*, counsel requested that the Court charge that the Government must prove that Petitioner knew of the dealer license requirement, and that Petitioner engaged in the conduct notwithstanding the need for such a license (J.A. 17). The Court declined to so charge (J.A. 18). Instead, the Court charged the jury:

> "As a general rule, the law holds persons accountable only for conduct they intentionally engage in. Thus, in describing the various crimes charged to you, I will on occasion explain that before you can find the defendant guilty, you must be satisfied that the defendant was acting knowingly and intentionally. Let me explain what is meant by these terms under the law.
>
> "A person acts knowingly if he acts purposely and voluntarily and not because of a mistake, accident, or other innocent reason. A person acts intentionally if he acts deliberately and with the specific intent to do something the law forbids. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But, he must act with the specific intent to do whatever it is the law forbids. A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person

> need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids" (J.A. 18-19).
>
> * * *
>
> "The government is not required to prove that the defendant knew that a license was required, nor is the government required to prove that he had knowledge that he was breaking the law" (J.A. 18-19).

THE VERDICT

At the conclusion of its deliberations, the jury returned a guilty verdict on both counts.

POST-VERDICT MOTION

Petitioner moved, pursuant to Rule 33, to set aside the jury's verdict, contending that the Court's charge was legally erroneous because it failed to require the Government to prove that he must have known of his need to possess a Federal Firearms Dealer's License. The Court denied the motion.

THE SENTENCE

On June 3, 1996, the Court sentenced Petitioner to serve 57 months imprisonment under the custody of the Attorney General. A timely Notice of Appeal was filed.

Petitioner is currently serving his sentence in the custody of the Bureau of Prisons.

SECOND CIRCUIT HOLDING ON APPEAL

On appeal, the Court of Appeals for the Second Circuit affirmed (*United States v. Bryan*, 122 F.3d 90 (2d Cir. 1997)). (J.A. 20-26). The Court, adhering to its prior decisions, held that "willfully" in 18 U.S.C. § 924(a)(1)(D) requires " 'only that the government prove that the petitioner's conduct was knowing and purposeful and that the petitioner intended to commit an act which the law forbids.' " *Id.* at 91, *quoting United States v. Collins*, 957 F.2d 72, 76 (2d Cir. 1992), *cert. denied*, 504 U.S. 944 (1992). The Court recognized that several other Circuits have construed the law differently (122 F.3d at 91), but it adhered to its view (*see also United States v. Allah*, 130 F.3d 33 (2d Cir. 1997), *cert. filed*, no. 97-6915 Nov. 26, 1997).

On December 12, 1997, this Court granted certiorari in order to resolve the conflict among the Circuits.

SUMMARY OF ARGUMENT

The enactment of the Firearms Owners Protection Act (FOPA) in 1986 (Pub. Law No. 99-308, 100 Stat. 449) followed a seven-year legislative initiative by firearms enthusiasts, sportsmen, and those concerned about the spread of federal influence on local matters, and marked the inclusion of the *mens rea* state of "willfulness" as a

requirement for prosecution of sellers of firearms without a federal firearms dealers license.

In the case at bar, the weapons in question were purchased in the State of Ohio, a State which had no firearm owner's licensing requirement, and were acquired by Petitioner, ultimately finding their way to New York. At Petitioner's trial, and notwithstanding written request (J.A. 17) and subsequent objection, the Trial Judge charged the jury that the proof of knowledge of the licensing requirement was not an element which must be proved. (J.A. 18-19).

Petitioner notes that, as of December 31, 1997, five Circuit Courts of Appeals have held that Congress intended that a person could be convicted of "willfully" dealing in firearms without a license only if he or she was aware of the federal licensing requirement and intended to violate it (*United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996); *United States v. Hayden*, 64 F.3d 126 (3rd Cir. 1995); *United States v. Obiechie*, 38 F.3d 309 (7th Cir. 1994); *United States v. Hern*, 926 F.3d 764 (8th Cir. 1991); *United States v. Rodriguez*, 1997 WL 797506 *2-*4 (5th Cir. 1997)). On December 12, 1997, this Court granted *certiorari* in order to resolve the conflict among the Circuits.

Petitioner contends that the statutory use of "willfully" requires such proof and that by failing to charge the jury properly, the Government's proof was unconstitutionally lessened.

ARGUMENT

PETITIONER'S CONVICTION FOR WILLFULLY VIOLATING THE FEDERAL FIREARMS DEALER STATUTE'S LICENSING PROVISION REQUIRES PROOF OF KNOWLEDGE OF THE LICENSING REQUIREMENT.

The presence and proof of *"mens rea"* (vicious will or intent) has long been the hallmark of criminal felony level prosecutions (*Morrissette v. United States*, 342 U.S. 246, 251, 72 S.Ct. 240, 96 L.Ed. 286, 294 (1952); *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) (local felon registration requirement invalid where petitioner unaware of registration requirement).

In a quarter century of increasing congressional involvement and possible encroachment into areas previously the responsibility of the State and local authorities, numerous federal incursions have resulted in regulatory enactments in a variety of fields deemed constitutionally (but *cf. United States v. Lopez*, 514 U.S. 549 (1995)) appropriate, to control and penalize those violating the statutory scheme.

In one early such case, *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), the conviction of a Chicago, Illinois sandwich shop owner for unlawful possession of food stamps was reversed, for although Moon's Sandwich Shop was not authorized by the Department of Agriculture to accept food stamps, absent proof that the defendant knew he was violating the statute or regulation.

In *United States v. United States Gypsum Company*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) this Court

upheld, in an opinion by Chief Justice Burger, a determination by the United States Court of Appeals for the Third Circuit reversing the conviction of a large Pennsylvania-based gypsum manufacturer, and a number of prominent gypsum industry corporate officials for Sherman Act violations, holding that proof of criminal intent, and not a mere reliance upon "knowing" conduct and resulting effect on market price was required.

Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604 (1991) held, in the context of a prosecution of an apparently worldly, sophisticated, politically motivated and well-paid pilot for American Airlines, that notwithstanding his failure to file federal income tax returns for several years, it was not enough to prove Cheek's failure to file, but rather that a criminal prosecution required proof of an intentional violation of a *known* legal duty. Proof simply establishing the absence of filed tax returns would not rebut the possibility of mistake, ignorance or negligence.

In *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) a closely divided Court reversed petitioners' convictions for *willfully* structuring currency transactions in violation of Treasury Department regulations, absent proof that petitioners knew their conduct violated the law (*see also United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985); *United States v. Aversa*, 984 F.2d 493 (1st Cir. 1993) and the concurring opn. of Breyer, J., pp. 502-503). The Court of Appeals for the Second Circuit had earlier ruled that convictions for structuring were proper, even absent proof of petitioner's knowledge of the CTR requirement (*see United States v. Scanio*, 900 F.2d 485 (2d Cir. 1990)).

In addition, in *Staples v. United States*, 511 U.S. 600 (1994), this Court held, in the context of a prosecution for unlawful possession of an unregistered "firearm" (there a machine gun), that the Government was required to prove that the petitioner knew that the weapon he possessed had the features and characteristics which make a weapon a machine gun, within the regulatory purview of 26 U.S.C. § 5861.

In the instant case, the indictment charged the violation of 18 U.S.C. § 922(a)(1)(A). Read together with the penalty provision in 18 U.S.C. § 924(a)(1)(D), only a person who "willfully violates" § 922(a)(1)(A) may be convicted.

The statute in question consists of two discrete *identified* mental states, both "knowingly" (18 U.S.C. § 924 (a)(1)(A)(B)(C)) and "willfully" (18 U.S.C. § 924(a)(1)(D)). Thus, when Congress determined to legislate in the area of possession and transfer of firearms, it had a wide range of well-defined mental states from which to, and did select, in determining when a crime would be recognized. Indeed, § 924 uses "knowingly" on three occasions and "willfully" but once (18 U.S.C. § 924(a)(1)(D)).

Particularly as the possession of firearms enjoys constitutional recognition and protection (U.S. Constitution, Amendment II), and where the manner and means in which possession and transfers of firearms was traditionally a matter of local concern,[1] the utilization of a

[1] Indeed, in the State of Ohio, where the underlying facts in this case occurred, there is no permit requirement for firearm purchases. The display of proof of adult age and an assertion of non-disqualifying characteristics suffice to authorize a legitimate firearms transaction.

willful mental state for those who endeavor to deal in firearms was a choice of critical significance.

THE STATUTORY LANGUAGE AT ISSUE

It has long been recognized that "willful . . . is a word of many meanings, its construction often being influenced by its context" (*Spies v. United States*, 317 U.S. 492, 497 (1943); *accord Ratzlaf v. United States, supra*, 114 S.Ct. 655, 659 (1994)). This Court has instructed that in attempting to discern the meaning of words of intent written into a statute, judges must remain "mindful of the complex of provisions in which they are embedded" (*Ratzlaf*, 114 S.Ct. at 659; *see King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (the meaning of statutory language "depends on context"). Thus, in determining the meaning of the word "willfully" in FOPA, the focus is on the "context of the term's use within the overall structure of the statute" (*United States v. Obiechie*, 38 F.3d at 313-14; *accord Sanchez-Corcino*, 85 F.3d at 553 & n.1.). When viewed fairly, the structure and context of the firearms statutes establishes that Congress intended "willfully" to mean the intentional violation of a known legal duty.

First, an analysis of the structure of § 924(a)(1) supports this conclusion. As the Seventh Circuit has noted, of the four subsections, (A), (B), and (C) require that a petitioner act "knowingly," while (D) alone requires a

willful violation of the law. "Congress' use of the term 'willfully' in subsection (D) indicates that it intended a *scienter* standard there that is distinct from the 'knowingly' requirement of the previous three subsections" (*Obiechie*, 38 F.3d at 314). The *Obiechie* court agreed with the decision in *United States v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988), that the use of both "knowingly" and "willfully" in different parts of § 924 was significant. Given that the two words must have different meanings when used in the same section, *Obiechie* reasoned that "willfully must mean something more than knowingly [.]" 38 F.3d at 315. The "only reasonable distinction between Section § 924(a)(1)'s 'knowingly' and 'willfully' standards is that the latter requires knowledge of the law." *Obiechie* at 315; *accord Rodriguez*, 1997 WL 797506 at *3. That is, "willfulness" refers to the "voluntary, intentional violation of a known legal duty." *Id.* at 315, quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991); *accord Sanchez-Corcino*, 85 F.3d at 553-54; *Hayden*, 64 F.3d at 130.

An analysis of the firearms law as a whole and of FOPA in particular leads to the same result.

At the time Congress passed FOPA, the federal firearms statute already provided, in (18 U.S.C. § 923(d)(1)(C) & (D)) for denial or revocation of a license to deal in firearms if the applicant or licensee "willfully" violated the Gun Control Act or "willfully" failed to disclose required information. Courts interpreting this provision had ruled consistently that "willfully" in § 923 meant that the applicant or dealer must have intentionally violated, or recklessly disregarded a known legal duty (*Stein's, Inc. v. Blumenthal*, 649 F.2d 463, 467 (7th Cir. 1980); *Perri v. Dept. of the Treasury*, 637 F.2d 1332, 1336 (9th

Cir. 1981); *Primo v. Simon*, 606 F.2d 449, 451 (4th Cir. 1979); *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir. 1979); *Shyda v. Director, Bureau of Alcohol, Tobacco and Firearms*, 448 F.Supp. 409, 415 (M.D. Pa. 1977)).

As this Court reaffirmed in *Ratzlaf*, "A term appearing in several places in a statutory text is generally read the same way each time it appears." 114 S.Ct. at 660. When it passed § 924, Congress knew that § 923 already described a willful actor as one who violates a known legal duty (*see Ratzlaf*, 114 S.Ct. at 659-60). Since Congress chose to use the same term "willfully" when enacting § 924, the word should be given the same meaning in this section as well (*see Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)) (it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning").

In addition, FOPA added another provision to the gun laws that illuminates the meaning of "willfully" in § 924(a)(1). A new section of the law, 18 U.S.C. § 922(b)(3), permits a licensed gun dealer to make a face-to-face sale of a rifle or shotgun to a resident of another state, so long as the sale fully complies with the laws of both states. That same section provides that "the dealer shall be presumed, for purposes of this sub-paragraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States." Criminal violations of § 922(b)(3) are governed by the same *mens rea* standard that is at issue here – "willfully" in § 924(a)(1)(D). The presumption that dealers have actual knowledge of state gun laws serves no purpose, unless evidence that the dealer knew the relevant law is needed to establish a willful violation.

Under the definition of "willfully" adopted by the Second Circuit, there is no requirement that the prosecution prove that a petitioner violated a known legal duty, and thus no purpose to the presumption. Thus, the Second Circuit's reading would reduce the presumption provision to "surplusage – words of no meaning" (*Ratzlaf*, 114 S.Ct. at 659). But "[j]udges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Id.* If, however, as the other Circuits have held, a willful violation does require proof that the petitioner violated a known legal duty, then the presumption provision represents a decision by Congress to put the burden on gun dealers to familiarize themselves with relevant state laws before making an interstate sale. Logically, then, "willfully" in § 924 must mean the violation of a known legal duty when applied to a violation of § 922(b)(3). And the same word in the same section – "willfully" in § 924 – must be given the same meaning when it is applied to a violation of § 924(a)(1). *Ratzlaf*, 114 S.Ct. at 660 (courts should "construe a single formulation . . . the same way each time it is called into play").

Finally, both here and in *Ratzlaf*, the *mens rea* standard of "willfully" is found in the penalty provision of the law, not in the substantive provision. The relevant section here says that the petitioner has committed a crime if he or she "willfully violates any other provision of this chapter." 18 U.S.C. § 924(a)(1)(D). In *Ratzlaf*, the relevant provision punishes any "person willfully violating this subchapter." 31 U.S.C. § 5322(a). As the Eighth Circuit has pointed out, "Because one cannot willfully

violate a statute without knowing what the statute prohibits, the Supreme Court (in *Ratzlaf*) required proof that petitioner intentionally violated a 'known legal duty' " (*United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996) (emphasis in original), *cert. denied*, 117 S.Ct. 2452 (1997)). The nearly identical textual structure here should require the same result as that reached in *Ratzlaf*, where this Court decided that a petitioner could not be found guilty of willfully violating the antistructuring provisions of 31 U.S.C. § 5324 (as they then existed), unless he or she knew that money structuring was illegal and intentionally violated the statute.

ANALYSIS OF THE FIREARM STATUTE'S HISTORY

An analysis of the legislative history of the "Firearms Owners' Protection Act (FOPA)," we respectfully submit, firmly establishes Petitioner's contention that the statute's clear purpose was for the Courts to apply "willfully" as the violation of a known legal duty.

FOPA was passed in 1986 after seven years of effort by its congressional sponsors, and the National Rifle Association (*United States v. Hayden*, 64 F.3d 126 at 129 (3rd Cir. 1995); David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 585, 610 (1987)) hereinafter "Hardy." It first passed in the Senate, as S. 49, after one day of debate, where it was voted upon without being referred to committee. (Hardy, *supra* at 588, 611-12, 620-21). Thus, there is no Senate Committee Report, nor was there a House/Senate Conference Report (Hardy, p. 625).

The House version of FOPA was blocked in committee by the then "liberal" Democratic House leadership until it was the subject of a discharge petition signed by a majority of the entire House[2] (Hardy, *supra* at 621-24). The leadership then reported a counter measure out of the Judiciary Committee. This bill, H.R. 4332, attempted to undo many key provisions of the Senate Bill, including its use of "willfully" as the level of intent required to secure a conviction for gun crimes, including the one at issue here (H.R. 4332, 99th Congress, 2d Session § 8(2); *see* Hardy, *supra* at 623 & n.206). H.R. 4332 was accompanied by House Report No. 99-495, which is the only committee report on any version of FOPA proposed in the 99th Congress. The House Report, although opposing the willfulness requirement, makes crystal clear that in adopting this standard, a conviction for selling guns without a license would require proof of the petitioner's "knowledge that such conduct requires a federal license, and a determination to violate that law" (House Report No. 99-495 at 11, reprinted in 1986 U.S. Code Cong. and Admin. News 1327, 1337).

As this Court has recognized in surveying legislative history, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . . " (*Garcia v. United States*, 469 U.S. 70, 76 (1984)). Simply put, "Committee Reports are 'more authoritative' than comments from the floor . . . " (*Id.*, quoting *Zuber v.*

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[2] In the context of the powers wielded by the Speaker of the House and the leadership, the resort to a populist legislative device bespeaks a groundswell of House support willing to test the House leadership.

Allen, 396 U.S. 168, 187 (1969)). Here, the only committee reports that members had in front of them when considering FOPA in the 99th Congress stated clearly that "willfully" meant that a petitioner must know the law and intend to violate it.

During the floor debate in the House, members were also "repeatedly informed that knowledge of the law would be necessary for a criminal conviction" (*United States v. Rodriguez*, ___ F.3d ___, 1997 WL 797506, at *3 (5th Cir. 1997)).

On the House floor, the Judiciary Committee's proposed bill was defeated, and a bill including the "willfully" requirement was passed as a substitute (132 Cong. Rec. H1752-53 – daily edition April 9, 1986; Hardy, at 624-625). In the course of that debate, the sponsor of the Judiciary Committee's bill, Representative Hughes offered an amendment to change "willfully" to "knowingly." Rep. Hughes explained to his colleagues that the "willfully" standard was "most damaging" because it would require the prosecution "to show that the (gun) dealer was personally aware of . . . the law, and that he made a conscious decision to violate the law" (132 Cong. Rec. H1684 – daily edition April 9, 1986) (statement of Rep. Hughes). The House then voted 248-173 to retain the "willfully" language (132 Cong. Rec. H1699 – daily edition April 9, 1986).

Thus, the strict meaning of "willfully" was specifically put forth on the floor of the House, and the House intentionally voted to retain its use (*United States v. Rodriguez, supra*). Thus, the overwhelming weight of the reliable available evidence of what Congress intended,

and what its members well understood, is that by passing the "willfully" provision, they were requiring the Government to prove that a petitioner knew of the federal licensing requirement, and intentionally violated it (*see United States v. Hayden, supra,* 64 F.3d at 129-30). At the very least, "the legislative history is consistent with (the strict) definition" (*United States v. Hern,* 926 F.2d 764, 767 & n.6 (8th Cir. 1991)).

CONSTRUCTION OF "WILLFULLY" IN SIMILAR STATUTES

The opinion of the Second Circuit relied heavily upon its earlier decision in *United States v. Collins,*[3] 957 F.2d 72, 76 (2d Cir. 1992), *cert. den.,* 504 U.S. 944 (1992). Its later holding in *United States v. Allah,* 130 F.3d 53, (2d Cir. 1997) follows an unfortunate Second Circuit pattern of statutory construction in misreading the legislative history.

It may sometimes be true that the term "willfully" has varying interpretations, as the late Justice Jackson observed in writing for the Court in *Spies v. United States,* 317 U.S. 492, 497, 63 S.Ct. 364 87 L.Ed. 418 (1943) rev'g 128 F.2d 743 (2d Cir. 1942). It is, we respectfully submit,

[3] In *Collins,* trial counsel did not contend that the Government was required to prove knowledge of licensure. As such, the appellate argument on appropriate *mens rea* was presented as a deficiency in the Trial Court's legal instruction under the plain error doctrine. Moreover, in *Collins,* the proof involved direct undercover sales to ATF agents. The Court held that the charge was error, but only harmless error in light of the powerful proof of *Collins'* guilt, applying *Yates v. Evatt,* 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991).

important to recall that Justice Jackson made this observation reversing a tax conviction previously affirmed by the Court of Appeals for the Second Circuit, and in attempting to apply two separate delphic criminal tax statutes – one of which made the willful failure to pay a tax when due a misdemeanor and the other, a willful attempt to defeat and evade the tax a felony. Justice Jackson did not have the benefit of a clearly expressed legislative intent and consistent uses of "willful" and "knowing" to distinguish the type of proof required to convict.

The question, however, is not limited to the bare limits of legislation, but rather, whether the clear Congressional intent is entitled to respect from the judicial branch.

The use of a willful mental state is not at all unusual when Congress recognizes the potential wide net of application and potential lack of notice to those who may find themselves the subject of a criminal prosecution (*see e.g., United States v. O'Hagan,* ___ U.S. ___, 117 S.Ct. 2199, 2214 (1997)).

Thus, when foreign policy concerns may be in conflict with free enterprise commercial endeavors, it is only those who willfully violate the ban on exportation of armaments found in 22 U.S.C. § 2778(c) who may be prosecuted (*see United States v. Golitscheck,* 808 F.2d 195, 202-203 (2d Cir. 1986) per Newman, J.; *United States v. Lizarraga-Lizarraga,* 541 F.2d 826, 828 (9th Cir. 1976)). Moreover, under the "Trading With the Enemy Act," 50 U.S.C. App. § 5, a willful *mens rea* is required, to protect

against unfair prosecutions of uninformed petitioners (*see United States v. Frade*, 709 F.2d 1387, 1392 (11th Cir. 1983)).

In times of war and national emergency, the Military Selective Service Act (50 U.S.C. App. 462) nonetheless still carefully limited resort to criminal penalties to those proven to have intentionally violated a *known* legal duty to register for service in the armed forces (*United States v. Kerley*, 838 F.2d 932, 936 (7th Cir. 1988 per Posner, J.) *accord United States v. Schmucker*, 815 F.2d 413, 421 (6th Cir. 1987).

In the field of labor relations, the use of a willful mental state has likewise been utilized by legislative draftsmen. Thus, to criminally violate the Railway Labor Act (45 U.S.C. § 152) has been held to require conduct which is voluntary and an intentional violation or a *known* legal duty (*see United States v. Winston*, 558 F.2d 105, 108 (2d Cir. 1977)). So too for violations of federal aviation regulations (*United States v. Eastern Airlines*, 192 F.Supp. 187, 192 (S.D.Fla. 1961)).

When Congress legislated in the "hot button" civil rights area, proof of a specific intent to violate a victim's constitutional right was still required (*United States v. North*, 910 F.2d 843, 884-888 (D.C. Cir. 1990)).

When Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977 (18 U.S.C. 2252), the need for a significant scienter requirement was also recognized, due to the constitutional free speech implications (*see United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994)). Moreover, Chief Judge Rehnquist's constitutionally sensitive and well-reasoned opinion, broadly embraced the need to broadly

apply scienter, even where the applicable statute on its face may be silent.

More recently, environmental concerns are in the forefront of public attention, and in inevitable conflict with business interests. The interpretation of the "Clean Water Act" and the "Resource Conservation and Recovery Act" (see 33 U.S.C. 1311(a) and 1319(c)(2)(A) also raises significant concerns about the mental state required for criminal violations (*see e.g., United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995), *cert. den.*, ___U.S.___, 116 S.Ct. 773 (1996); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), *cert. den.*, 513 U.S. 1128 (1995) (scienter requirement) (inapplicable to each element of offense) but *cf. United States v. Ahmad*, 101 F.2d 386 (5th Cir. 1996)).

THE CIRCUIT'S APPROACH TO FOPA

The Second Circuit's holding here, and subsequentiy in *United States v. Allah*, 130 F.3d 33 (2d Cir. 1997), gives voice to an *ad hoc* approach to criminal statutory interpretation which views firearms as not eligible for a true "willfull" *mens rea* because they are inherently dangerous, and subject to regulation.[4] Moreover, the Second Circuit

[4] This is certainly at variance with traditional role of the Federal Government in firearms control (*see, e.g., Printz v. United States*, ___U.S.___, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997)), which did not even begin until enactment of the Omnibus Crime Control and Safe Streets Act of 1968 in response to an explosion of urban street violence and mob rioting bordering upon civil insurrection (*see Lewis v. United States*, 445 U.S. 55, 63, 100 S.Ct. 915, 919-920, 63 L.Ed.2d 198 (1980)).

revealed its true agenda in *Allah* by suggesting that the Congress did not need to enact a willful mental state.

This approach is clearly wrong. The proper *mens rea* to be applied here is that intended by Congress, and this simple rule is not affected by the fact that the subject matter of this prosecution was guns, rather than money (*see, e.g., Bailey v. United States*, 116 S.Ct. 501, 506-07 (1995)). Even if the Second Circuit believed that Congress did not "need" to add a strict willfully requirement to the firearms law, the issue is solely whether Congress decided that this limitation on some federal firearms prosecutions was desirable and then included it in the Firearms Owners' Protection Act. The record is unequivocal that this is just what Congress did.

Moreover, while this is a firearms case, guns are not so inherently evil that a Court is thereby authorized to ignore the intent of Congress. Any argument to this effect was surely laid to rest by *Staples v. United States*, 114 S.Ct. 1793 (1994), where this Court stated:

> Neither, in our view, can all guns be compared to hand grenades. . . . [T]he fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country. Such a tradition did not apply to the possession of hand grenades in *Freed* (401 U.S. 601 (1971)) or to the selling of dangerous drugs that we considered in *Balint* (258 U.S. 250 (1922)).
>
> Moreover, despite the overlay of legal restrictions on gun ownership, we question whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and

> blameless conduct. Roughly 50 per cent of American homes contain at least one firearm of some sort, and in the vast majority of States, buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than would buying a car.

114 S.Ct. at 1799, 1801.

In contrast to the holding below, Judge Rovner's opinion for a unanimous Court in *United States v. Obiechie*, 38 F.3d 309, 311-316 (7th Cir. 1994) provides, we respectfully submit, the legislatively accurate and judicially appropriate analysis of the statute in question and its application by holding that willfulness in the context of an 18 U.S.C. § 922(a)(1)(A) prosecution means proof that the petitioner is aware that a firearms dealer's license is required (*accord United States v. Hayden*, 64 F.3d 126, 128-132 (3d Cir. 1995); *United States v. Sanchez-Corcino*, 85 F.3d 549, 552-554 (11th Cir. 1996); and most recently in *United States v. Rodriguez*, ___ F.3d ___, 1997 WL 797506 (5th Cir. 1997).

Thus, the majority of well-reasoned Circuit authority has recognized that the 1986 statutory amendments, for good or ill, reflected a clear and unequivocal legislative judgment it would not authorize prosecutions of unintentional violators of the firearms statutes, and clearly manifests a congressional intent that, only *those who knew and acted contrary* to law would face federal prosecution for firearms transactions without the appropriate license (*see, e.g., United States v. Sherbondy*, 865 F.2d 996, 1001 (9th Cir. 1988), *accord United States v. Obiechie, supra*, p. 312).

THE APPLICATION OF THE RULE OF LENITY

In light of the analysis above, it is clear that "willfully" in FOPA means the intentional violation of a known legal duty. If this Court were to conclude, notwithstanding contrary indications that the meaning of "willfully" in § 924(a)(1)(D) is ambiguous, the rule of lenity "provides a time-honored interpretive guideline when the congressional purpose is unclear (*Liparota v. United States*, 471 U.S. 419, 427 (1985)). This Court has long recognized that, where legislative ambiguity is perceived in a criminal statute, the rule of lenity requires that the Court "resolve any doubt in favor of the petitioner" (*Ratzlaf*, 114 S.Ct. at 662-63; *accord Reno v. Koray*, 515 U.S. 50, 115 S.Ct. 2021, 2029 (1995); *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Crandon v. United States*, 494 U.S. 152, 160 (1990); *United States v. Bass*, 404 U.S. 336, 347-50 (1971); *Toussie v. United States*, 397 U.S. 112, 122 (1970)). Since lenity principles "demand resolution of ambiguities in criminal statutes in favor of the petitioner," *Hughey*, 495 U.S. at 422 (1990), Petitioner should prevail for this reason as well.

THE APPLICATION TO THE FACTS OF THIS CASE

The final, and not, we respectfully submit, insignificant aspect, of the Court's review requires a consideration of the Petitioner – his age, background, and level of sophistication in assessing whether he, and other lay individuals, could reasonably be aware of the existence of the federal licensing statute.

Importantly, as previously noted, the purchase of firearms in Ohio does not require permission of a state licensing authority. Proof of identity and age coupled with an informational form suffice. Accordingly, in the context of the transactions charged herein there would hardly be anything to place an individual on notice that at some unquantified later time, should he sell firearms he would run afoul of a dealer's license requirement.

Beyond the lack of notice that a dealer's permit was required, it is important to recall that individuals who possess, barter, and occasionally sell firearms, are usually not surrounded by a battalion of lawyers[5] to advise them on the requirements of possessing or transferring their firearms. Simply put, in an age of big government's increasing intrusion into the previously purely local actions of ordinary people, to federally penalize for lack of knowledge is a cruel targeting of those least able to keep up.

Finally, in what can only be characterized as a cruel David and Goliath matchup, the Government has selected for prosecution a veritable teenager who was learning impaired and never got beyond the ninth grade.

While it may be assumed that a gun club member has access to information of the Dealer's licensure requirement, or that a sports shop owner can be presumed to have such knowledge, it would be cruel to target the

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[5] This is contrasted to circumstances in the tax, import/export, pharmaceutical and environmental areas where frequently institutional clients maintain legal departments or staff just to monitor compliance (*see, e.g., United States v. Wilson*, ___ F.3d ___, 1997 WL 785530 (4th Cir. 1997)).

young and slow of mind and hold them to *know* of the existence of an obscure statute.

Proper enforcement requires recognition that legislation to be effective must be known and applied fairly. To sentence a mentally deficient teenager to a federal jail because he did not know he needed a firearms dealer's license punishes a member of vulnerable and uninformed class of individuals. It surely suggests how a little-known statute can inadvertently become a trap for the unwise, unsophisticated, and unwary.

We urge this Court to reverse this conviction, whether as a function of statutory construction (*e.g., United States v. Obiechie, supra*; or as a function of the application of the doctrine of lenity (*United States v. McNally*, 483 U.S. 350, 359-360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987))).

II

THE TRIAL COURT'S REFUSAL TO CHARGE THE JURY THAT THE GOVERNMENT MUST PROVE THE PETITIONER'S KNOWLEDGE OF HIS OBLIGATION TO POSSESS A FEDERAL FIREARMS DEALER'S LICENSE DIMINISHED THE GOVERNMENT'S BURDEN OF PROOF AND DEPRIVED PETITIONER OF A FAIR TRIAL

Perhaps no portion of the trial Judge's jury charge is more important to be accurate, balanced and fair, than its instructions on the requirement of the intent which the jury must find before a conviction can occur. Intent is always a jury question (*McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307, 324 (1991)).

As argued in Point I, the crucial element of intent was the key issue in this case. Thus, if a properly instructed jury believed that Petitioner acted out of ignorance, foolishness or stupidity, the broad "line in the sand" separating the unknowledgeable accused from the knowledgeable and unscrupulous arms merchant is as apparent as it is real.

The jury, however, that decided Petitioner's case acted under the belief, as directed by Judge Trager's clear instructions, that knowledge of the licensing requirement was simply not a question which it was required to consider, in determining guilt (J.A. 18-19). We must, of necessity, presume that the jury followed the Court's instruction (*Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)). Where juries are erroneously instructed on the issue of intent, the unfair prejudice to the accused requires reversal (*see Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 39 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed. 2854 (1978)).

While concededly application of the "harmless error" rule may provide some attraction in a given case (*Rose v. Clark*, 478 U.S. 570, 580-582, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)) even when the charge in the instant case is considered in its entirety (*Francis v. Franklin*, 471 U.S. 307, 315, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)) it should have no application here. This is not a situation, such as the Court confronted last term in *Johnson v. United States*, ___ U.S. ___, 117 S.Ct. 1544 L.Ed.2d 718 (1997), where relying upon prior legal authority, trial counsel did not request an instruction on the element of materiality, believing it to be a question of law for the Court, and not a factual

question requiring jury consideration. Here, the issue went directly to the issue of intent.

Nor, we respectfully submit, is it a situation such as in *Rogers v. United States*, 94 F.3d 1519 (11th Cir. 1996), *cert. granted*, ___ U.S. ___, 65 U.S.L.W. 3777, *cert. dism'd*, ___ U.S. ___, 62 Cr. L. 2047 (1998) (which was orally argued on November 5, 1997) where Petitioner admitted the essential element of the offense about which the Trial Court neglected to instruct the jury (*see* 62 Cr. L. Rptr. 3075-3078 (1997)). A verdict based upon a finding of the incorrect and contested mental state, cannot fairly be permitted to stand (*Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969 (1983); *Cool v. United States*, 409 U.S. 100, 104, 93 S.Ct. 354, 357 (1972)).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE CASE REMANDED TO THE COURT OF APPEALS WITH DIRECTION TO VACATE THE CONVICTION OR ORDER A NEW TRIAL

Dated: New York, New York
January 22, 1998

Respectfully submitted,

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INDEX TO STATUTORY APPENDIX

STATUTES INVOLVED

18 U.S.C. § 922(a)(1)(A) states:

Unlawful acts

(a)(1)(A) "It shall be unlawful for any person – except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business or importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; . . . . "

18 U.S.C. § 924(a)(1)(D) states:

Except as otherwise provided in this subsection- . . . Whoever

(D) Willfully violates any other provision of this Chapter shall be fined under this title, imprisoned not more than five years or both. . . .
